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EXAMINER

MENDOZA, MICHAEL G

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* G. THOMAS WOLF

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Appeal 2009-003983  
Application 09/834,208  
Technology Center 3700

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Decided: August 12, 2009

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Before DEMETRA J. MILLS, LORA M. GREEN, and  
RICHARD M. LEOVITZ, *Administrative Patent Judges*.

MILLS, *Administrative Patent Judge*.

DECISION ON APPEAL

## STATEMENT OF CASE

This is an appeal under 35 U.S.C. § 134. The Examiner has rejected the claims for obviousness. We have jurisdiction under 35 U.S.C. § 6(b).

The following claims are representative.

5. An oxygen mask comprising a pair of elastic bands, both ends of each pair affixed at points of attachment to each of both sides of said oxygen mask, said bands extendible to loop over and around each ear of the patient and adjustably securable to said patient by pulling the ends anteriorly through said points of attachment.

8. An oxygen mask having an improved means for being secured over the nose and mouth of a patient, wherein the oxygen mask comprises a pair of elastic bands, both ends of each pair affixed at points of attachment to each of both sides of said oxygen mask, said bands extendible to loop over and around each ear of the patient and adjustably securable to said patient by pulling the ends anteriorly through said points of attachment.

12. The mask of claim 5, wherein said mask comprises a nosepiece with two exhalation ports covered with a flap valve.

### *Cited References*

Hudsen	US 2,843,121	July 15, 1958
Laanen et al.	US 4,865,027	Sep. 12, 1989
Bledstein	US 5,701,892	Dec. 30, 1997
Dyrud et al.	US 5,819,731	Oct. 13, 1998

### *Grounds of Rejection*

1. Claims 5-10, 12-15, and 17<sup>1</sup> are rejected under 35 U.S.C. § 103(a) as being unpatentable over Hudson in view of Bledstein.

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<sup>1</sup> The Examiner does not include claims 15 and 17 in the statement of the rejection, but discusses those claims in the statement of the rejection at page

2. Claims 12, 13, and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Hudson and Bledstein and further in view of Laanen.
3. Claim 16<sup>2</sup> is rejected under 35 U.S.C. § 103(a) as being unpatentable over Hudson and Bledstein and further in view of Dyrud.

### ISSUE

The Examiner finds that “it would have been obvious to one having ordinary skill in the art at the time the invention was made to replace band 17 [of Hudson] with ear loops of Bledstein to prevent entanglement of bands in a user's hair, glasses, or hat and to make it easy to put on (col. 2, lines 32-33 and col. 6, line 10-17).” (Ans. 3.)

Appellant contends that Hudson teaches a single elastic band and teaches away from the claimed invention.

The issue is: Has Appellant demonstrated error in the Examiner’s obviousness rejection.

### FINDINGS OF FACT

1. “Hudson teaches an oxygen mask 10 having a means for being secured over the nose and mouth of a patient comprising: an elastic band, points of attachment 15 on both sides of the mask, and the elastic band securable to the patient by pulling the ends anteriorly through the points of attachment (col. 2, lines 27- 31).” (Ans. 3.)

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4 of the Answer, and at page 7 of the Final Rejection dated January 22, 2007.

<sup>2</sup> Claim 16 was cancelled by amendment filed June 16, 2006 (App. Br. 4).

2. “Hudson fails to teach a pair of bands extendible to loop over and around each ear of the patient.” *Id.*

3. Bledstein teaches a mask that uses a pair of bands affixed at four points of attachment to the mask and extendible to loop over and around each ear of a patient. *Id.*

4. The Examiner finds that “it would have been obvious to one having ordinary skill in the art at the time the invention was made to replace the band of Hudson with ear loops of Bledstein to prevent entanglement of bands in a user's hair, glasses, or hat and to make it easy to put on (col. 2, lines 32-33 and col. 6, line 10-17).” *Id.*

5 Hudson and Bledstein fail to specifically teach the use of a flap valve.”  
(Ans. 5.)

6. “Laanen et al. teaches a mask with a common valve (20) to vent exhaled gases.” *Id.*

7. The Examiner finds that “it would have been obvious to one having ordinary skill in the art at the time the invention was made to use a valve to allow exhaled air to be forced out to the atmosphere (col. 4, lines 58-60).”  
*Id.*

## PRINCIPLES OF LAW

In assessing a claim's obviousness, "[a] court must ask whether the improvement is more than the predictable use of prior-art elements according to their established functions." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 401 (2007).

"The combination of familiar elements according to known methods is likely to be obvious when it does no more than yield predictable results." *Id.* at 417.

A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant. The degree of teaching away will of course depend on the particular facts; in general, a reference will teach away if it suggests that the line of development flowing from the reference's disclosure is unlikely to be productive of the result sought by the applicant.

*In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994).

"Non-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. . . . [The reference] must be read, not in isolation, but for what it fairly teaches in combination with the prior art as a whole." *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986).

## ANALYSIS

We agree with the Examiner's reasoning, fact finding, and response to Appellant's arguments as set forth in the Answer, and adopt them as our own. We provide the following additional comment.

1. Claims 5-10, 12-15, and 17 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Hudson in view of Bledstein.

Appellant contends that Hudson teaches a single elastic band and teaches away from the claimed invention. However, “[n]on-obviousness cannot be established by attacking references individually where the rejection is based upon the teachings of a combination of references. . . . [The reference] must be read, not in isolation, but for what it fairly teaches in combination with the prior art as a whole.” *In re Merck & Co., Inc.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). The Examiner cited Bledstein disclosing a mask with a pair of bands which are extendible to loop over and around each ear of a patient to overcome the deficiency of Hudson only disclosing a one band attachment mechanism. We find no teaching away in Hudson, only the predictable use of prior-art elements such as the ear loops of Bledstein, according to their established function.

With respect to claim 5, Appellant argues that even if one were to substitute the strap of Bledstein for the single strap system of Hudson one would not arrive at the presently claimed invention because the straps would be permanently attached to the mask. (App. Br. 14.)

We are not persuaded. Hudson teaches the use of points of attachment that allow adjustability of straps. In particular, Hudson teaches that a “strap 17 ...will hold its position very well against considerable pull and can readily be moved only by pinching the strap 17 together adjacent the opening, forcing it into a relatively rounded shape and then pulling it.” (Col. 2., ll. 20-33.)

Appellant argues that Bledstein is not an oxygen mask. (App. Br. 13.) We agree with the Examiner that Bledstein can be considered an oxygen

mask since oxygen is able to be inhaled by the user. (Ans. 6-7.) We are not persuaded by Appellant's argument.

Appellant argues that evidence of record establishes long-felt need. (App. Br. 17.) However, according to the Examiner the Declarations of long felt need have not be entered because Appellant failed to provide a good showing of why the declarations were necessary and not presented earlier in prosecution. (Ans. 7.) For this reason, the declarations are not part of the record before us.

2. Claims 12, 13, and 18 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Hudson/Bledstein and further in view of Laanen.

Appellant presents similar argument for the rejection over Hudson/Bledstein and further in view of Laanen as presented in rebuttal of the primary combination of Hudson and Bledstein. (App. Br. 19.) For the reasons provided herein, the obviousness rejection over Hudson/Bledstein and further in view of Laanen is affirmed.

3. Claim 16 is rejected under 35 U.S.C. § 103(a) as being unpatentable over Hudson/Blestein and further in view of Dyrud. This rejection is moot as claim 16 has been cancelled.

#### SUMMARY

The rejection of claims 5-10, 12-13, and 14 under 35 U.S.C. § 103(a) as being unpatentable over Hudson in view of Bledstein is affirmed. The rejection of claims 12, 13, and 18 under 35 U.S.C. § 103(a) as being

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unpatentable over Hudson/Bledstein and further in view of Laanen is affirmed. The rejection of claim 16 under 35 U.S.C. § 103(a) as being unpatentable over Hudson/Blestein and further in view of Dyrud is mooted by its prior cancellation from the application.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

cdc

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